IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, A. D. 1941

No. .....

ERNEST E. MARKS COMPANY, A CORPORATION,
(*Plaintiff*) *Appellant,*

vs.

THE UNITED STATES OF AMERICA,
(*Defendant*) *Appellee.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

1.—OPINIONS OF THE COURTS BELOW.

The opinion of the United States Customs Court, Third Division, appears at page 12, *et seq.*, in the printed transcript of the record in the United States Court of Customs and Patent Appeals. It is reported as C. D. 305. The opinion of the United States Court of Customs and Patent Appeals appears at page 27, *et seq.*, of the record. It is reported as C.A.D. 156, Vol. 76, No. 34, dated February 20, 1941.

2.—JURISDICTION.

The grounds for the jurisdiction of this Court are stated in the petition annexed. The petition is filed in accordance with Rules 38 and 43 of this Court.

3.—STATEMENT OF THE CASE.

The facts are sufficiently stated in the "Summary Statement of the Case" included in the petition to which this brief is attached.

4.—SPECIFICATION OF ERRORS.

It is submitted that the United States Court of Customs and Patent Appeals erred in the following particulars:

(a) In holding that the effect of the Reciprocal Trade Agreement with Cuba of 1934 was to make the entire amount of the reductions in duty rates therein established exclusively preferential to Cuba, rather than only twenty per cent thereof.

(b) In finding that Sub-section 350 (b) authorized the President to proclaim a trade agreement containing reductions in duty rates exclusively preferential to Cuba.

(c) In not holding that Sub-section 350 (b) was unconstitutional, void, and of no effect.

(d) In not finding that the reduction in duties upon importations to the United States from Cuba established by the Cuban Trade Agreement of 1934 must be generalized to other nations.

(e) In not finding that the treaty between the United States and the Argentine Republic requires that the lowest duty rate accorded upon any articles imported into the United States from Cuba must also be accorded upon like articles imported into the United States from Argentina.

(f) In not finding that the correct duty rate upon corn imported from Argentina was 12½¢ per bushel.

(g) In failing to reverse the judgment appealed from and to remand the cause to the United States Customs Court with directions to order a refund of the duty paid in excess of the legal rate.

5.—SUMMARY OF ARGUMENT.

I.

The only portion of the reduction in the duty rate upon imports from Cuba which the amendment to the Tariff Act of 1934 authorized, or for which the trade agreement provided, which was exclusively preferential to Cuba, was twenty per cent below the lowest rate charged upon exportations from any other nation. The maximum rate of duty upon corn according to the Cuban Trade Agreement was 10 cents per bushel. If this maximum rate is to reflect a twenty per cent exclusively preferential discount, then 10 cents per bushel must be eighty per cent of the general rate. The duty rate upon corn imported from all other non-discriminating or favored treaty nations was thereby fixed at 12½ cents per bushel.

II.

As an alternative contention:

(A) Section 350 did not authorize the President to place, in trade agreements with Cuba (which trade agreements the Act DID authorize) ANY provision granting exclusively preferential treatment to Cuba;

(B) If the trade agreement of 1934, which was effected pursuant to Section 350, purported to grant unto Cuba any exclusive preferential, such purported exclusive in the trade agreement was not authorized, and is therefore void and of no effect. The non-exclusive reduction, however, WAS authorized in Subsection 350 (a) by Congress, and hence must be generalized to other nations. The exclusive feature, only, of the trade agreement is void; the balance of the agreement is valid and operative.

III.

Sub-section 350 (b) is unconstitutional and void if construed to have any affirmative significance. It therefore does not authorize an exclusive preferential to Cuba in duties upon Cuban imports into the United States. Thus, the generalization clause of Sub-section 350 (a) applies to the Cuban Trade Agreement, and the duty rate thereby reduced must be accorded upon articles imported from Argentina, to-wit, upon the corn in question.

ARGUMENT.

I.

The purpose of Section 350 is expressed in that Act as being to expand foreign trade of the United States, and to effect such purpose the Congress provided for generalization to all countries of all concessions specified in any trade agreement. No reduction of any rate of duty could be confined to any one country.

Sub-section 350 (a) was intended by Congress to preserve to Cuba its preferential status under the 1902 Treaty, and is the sole authority vested in the President to make changes in duty apart from the continuation or modification of the Cuban preferential. A construction of Section 350 to the effect that all concessions granted to Cuba, including concessions in excess of the twenty per cent preferential established in the 1902 Treaty, are exclusively preferential, must result either in holding that the Cuban Trade Agreement could be violated by subsequent trade agreements with other countries, or that such later agreements are invalid.

Section 350 did not authorize that the Cuban rate reductions be exclusive to the extent of more than twenty per cent. If the Cuban Agreement purported to authorize an exclusive preferential of more than twenty per cent, to the extent of the excess the preferential was not authorized by Congress, and was therefore null and void. Therefore, the only exclusively preferential duty rate reduction effected by the Cuban Trade Agreement of 1934 was to the extent of twenty per cent, and the difference between this reduction and the general reduction was not an exclusive, was generalized, and should be ordered refunded to the importer.

II.

This is an alternative contention, under which the importer claims that Section 350 did not authorize any exclusively preferential trade agreement with Cuba whatsoever, and that therefore any purported exclusive in the Cuban Trade Agreement was void.

Sub-section 350 (b) provides that nothing in the section shall be construed to *prevent* the application of the provisions of the Treaty of 1902, *or to preclude* giving effect to an exclusive agreement with Cuba concluded under this section.

Sub-section (a) specifically authorized the President to reduce duty rates by a trade agreement with any foreign nation provided that such reduction should be extended to the benefit of all other non-discriminating nations. It has been held by the United States Court of Customs and Patent Appeals that Cuba is a foreign nation, and that excepting for Sub-section (b), the reduction granted Cuba by the Trade Agreement would not in any sense be preferential and would necessarily be generalized to the benefit of the importer of a like article from a non-discriminating nation. *F. H. Von Damm* v. *U. S.*, 25 C.C.P.A. 97, page 103.

Congress in Sub-section (b) did not authorize the President to do anything. The sub-section simply states that nothing in (a) shall prevent or preclude the President from giving effect to exclusive agreements. But the exclusive itself is not authorized in (a) or in any other statute. It is obvious from reading (a) that nothing therein prevents or precludes the President—for example, from reducing the rate on corn imported from Argentina to 12½¢ per bushel, or from increasing the rate on Cuban corn to 40¢ per bushel, or from negotiating a new treaty with Argentina,

or from doing any one of a thousand different acts, either germane or irrelevant to Sub-section (a).

The simple fact that Congress stated in (b) that nothing in (a) prevents a certain Presidential act, does not mean that (b) authorizes the President to do such act. (b) merely states that (a) contains no inhibitions. Manifestly, if (a) does not authorize an exclusive, and (b) does not even say that (a) does, no authorization for the exclusive is to be found.

A court is without power to supply statutory omissions or to read into a piece of legislation, language which is actually not there. Even though it be deemed that the Congressional intent was to authorize the President to conclude an exclusively preferential trade agreement with Cuba, the missing authority cannot be supplied by the Court if it does not appear in the language of the statute itself. Black, Interpretation of Statutes, 1911, pages 45 to 55; *Proctor & Gamble Mfg. Co.* v. *U. S.*, 19 C.C.P.A. 415, at page 418; *Woodbury* v. *Berry*, 18 Ohio St. 456; *Maltus* v. *U. S.*, 6 Ct. Cust. Appls. 525.

We therefore contend that Sub-section (b) does not limit the broad authority contained in Sub-section (a) to the President to make a trade agreement with Cuba the benefits of which in its reduction of duty rates are generalized to the products from all other non-discriminating nations, including Argentina.

Moreover, Section 350 could not authorize any exclusive preferential because Sub-section 350 (c) limits the modification to duties or import restrictions, whereas the exclusive preferential is neither; in fact, it is their exact antithesis.

III.

This Court in the case of *Hampton, Jr. & Company* v. *U. S.*, 276 U. S. 624 (and in numerous other decisions), laid down certain standards for the determination of what type of legislation violates the Constitution of the United States by purportedly delegating to the Executive, legislative and treaty-making power. These decisions have shown that no Congressional delegation of power to the President is valid, which necessarily involves a discretion in the President as to what the law should be.

The decisions hold that the Congress must lay down by the legislative Act an intelligible principle, a standard, or yardstick, to or by which the Executive authorized to act pursuant to the legislation must conform; otherwise the discretionary authority granted to the Executive by the Congress is a forbidden delegation of legislative power.

Sub-section (a) complies with these requirements for constitutional validity. Thereunder a certain fact must exist, and the President must so find, to-wit, that existing duties or other import restrictions are unduly burdening or restricting the foreign trade of the United States, which burdens and restrictions may be relieved by the execution of trade agreements. The fact itself is to be found by the President in the manner provided by the statute.

Assuming that such fact shall exist and that the conclusion of any such trade agreement would operate as a curative, the Congress, upon this presupposed condition, determined that a revision of duty rates of not to exceed fifty per cent would be salutary, and therefore legislated that in such event such revision should be made operative. The President thereby was merely constituted the agent of the legislature to ascertain and declare the event upon which the Congress' expressed will that duty rates upon certain

articles should be reduced by fifty per cent, was to take effect.

Sub-section (b) is grounded upon an entirely different principle. No standards are thereby established to circumscribe the Presidential act. No statements of policy or principle are therein set forth to which the President in his ministerial function is required to conform. The discretion which fixes the terms of the exclusive preferential does not reside in the legislators who voted the enactment, but in the Executive, and it is upon his exercise of his own discretion that exclusively preferential treatment to Cuba shall, or shall not, be accorded.

There is no principle, not one single guide or term, in Sub-section (b), conformably to which the President is required to act. There is no standard, no pattern, no condition precedent, no instruction, not even any limitation to which it is required that the President refer, or consider, prior to concluding any exclusively preferential trade agreement with Cuba which he may in his unlimited discretion desire to proclaim.

No particular fact is necessary to be found to support the exclusive, or any yardstick laid down as to when he may or may not give or refuse it. If construed to authorize the exclusive, Sub-section (b) amounts to an absolute grant of unlimited legislative power to the President to make an exclusive agreement as he shall see fit, and is therefore unconstitutional and void.

IV.

Because Section 350 has extended the principle of the favored nation clause of treaties to all non-discriminating nations when reciprocal trade agreements are proclaimed, the distinction formerly established by this Court in the cases of *Bartram* v. *Robertson,* 122 U. S. 116, and *Whitney* v. *Robertson,* 120 U. S. 190, between the so-called "condi-

tional" and the so-called "unconditional" favored nation clauses, has been abolished by this statute. Therefore, the extension of preferential treatment to Cuba by the 1934 Trade Agreement amounts to a violation of the existing treaty between the United States and Argentina. While Congress has the power to violate a treaty (as distinguished from the right), the Executive has no such power.

CONCLUSION.

A reading of Section 350 shows that no authority is therein provided for the granting of an exclusive preferential to Cuba. An examination of Sub-section 350 (b) in the light of the decisions of this Court discloses that it is unconstitutional in its delegation of legislative and treaty-making powers to the Executive without the establishment of any yardstick for the exercise of such power.

Under the generalization provision of Section 350 and under the favored nation treaty with Argentina, if Sub-section (b) does not validly authorize an exclusive preferential, then the lowered Cuban duty rate must be generalized in favor of the importer. But even if any warrant for an exclusive preferential to Cuba can be read into Section 350, the amount of the preferential could not exceed twenty per cent of the amount of the rate reductions under the Cuban agreement.

It is submitted that the importer is entitled to the refund of duties claimed.

Respectfully submitted,

DELBERT A. CLITHERO,
Counsel for Petitioner,
1 North LaSalle Street,
Chicago, Illinois.

J. MILTON GUY,
Of Counsel.